THE FEUDAL LAWS OF CAROLINA.

If one wishes to study the purest forms of ancient English custom in America, it is not to New England with its early republican institutions, nor yet to the Middle States, that one must look. Many old institutions were indeed transplanted to those sections, and can still be clearly traced, but to study them to the best advantage, one must turn to the South; nor yet to the South of to-day, but of the earliest times, when the colonies were yet in the closest touch with the England which still clung to the remnant of mediæval custom and thought with that passionate devotion which was so long kept alive by the interests of the house of Stuart. New England was far more aptly named than even the Pilgrim Fathers themselves conceived. It was not New England only because it was to be another England beyond the sea. There was a far deeper meaning in the name, for on those bleak shores was to be planted the germ of the new life which had not yet developed in the mother island, whose dawn had scarcely been discovered by even the most far-seeing of Britain's statesmen. Here the new life and the new liberties of Englishmen were to bear full fruit long before the yeomanry at home should dare to assert the rights which they afterwards maintained so stoutly, and with such success, against the king himself. The new liberty meant the utter giving up of everything pertaining to, or growing out of, the old feudal life, and the Pilgrim Fathers pledged themselves to abandon every shred of the old system when, on that memorable morning in the cabin of the Mayflower, they drew up the constitution by which their infant State was to be governed. With the partial exception of New York, all the Middle Provinces were settled with very much the same principles in view. The colonies of Maryland, Virginia, and Carolina were the only ones

founded under strictly Cavalier influences, and it is there that we shall find many of the customs of feudal England retained, — though perhaps only in theory, — long after their very existence had been forgotten by the inhabitants of the more northerly settlements.

Of all the original colonies Carolina was, in many respects, the most unique. From its beginning, it was a peculiar institution. At the time of its founding England had just passed through the greatest revolution known in her history, and although royalty was once more firmly in power, and every institution of the Commonwealth had been torn up root and branch, a decade or more of republicanism had dealt a blow to the ancient custom of the realm from which it was destined never to recover. The Cavalier class still held an unswerving allegiance to every memory of the old régime, but the common people had tasted of liberty, as a lion of blood, and despite the restoration of the old, and the subversion of the new order of things, feudalism in its faintest phase was dead, and every effort to resurrect even a semblance of the system was destined to meet with ignominious failure.

Such, in brief, was the condition of affairs in England when Carolina was founded. Its charter was given by Charles II. to men who were steeped in the old spirit which had had its birth in feudalism. For the most part they were of families which had held their estates from the time when the villain had no rights which the lord was bound to respect. They saw that England was determined to trample upon every tradition of the system to which they owed their greatness, and realizing that they could no longer exercise their rights of overlordship in the kingdom, they determined to establish beyond the sea, in the wilds of America, a dominion over which they could hold sway as their ancestors had done over the peasantry of the realm, centuries before. The first fruits of this decision were the famous Fundamental Constitutions of Carolina, the most unique scheme of government ever devised for an English colony, and one

which can never lose its interest for students of political institutions. They were drafted by the philosopher John Locke, and have been justly characterized as a bold attempt to breathe life into the dead body of English feudalism, and to transplant it in its entirety to the shores of the new world. The common remark that it was an effort to found an ideal government is indeed true, but it was an ideal that even the seventeenth century scorned to realize, for it sought to turn back the progress of civilization and freedom three hundred years, and to foist upon freemen a system borrowed from a time when no man was free who did not maintain his liberty by the strong arm of force.

Where Shaftesbury, the President of the Board of Proprietors, expected to find Englishmen who would live under such a system, it is hard to say, but he evidently looked forward to seeing the Constitutions set up and enforced in every detail. However ridiculous the bombastic terms of this remarkable instrument may sound to-day, for many years they were very serious matters to the colonists, and the contentions which arose over the construction of many of the articles, came near precipitating civil war on more than one occasion. Of course, the Constitutions, in their extreme form, despite the efforts of the Proprietors, were never enforced. Englishmen in Carolina were found to be no more subservient than Englishmen in England, and they persistently refused to be governed by a code which took from them liberties they had been accustomed to enjoy even in the England of the early Stuarts. From the very beginning of the colony the contest between people and Proprietors was maintained with ever increasing bitterness until the Revolution of 1719 overthrew the unnatural form of government, and gave the province peace and prosperity under the protection of the Crown. Long before this time, however, the Constitutions were practically abrogated, although in large part they remained in theory the laws of the colony until 1719, and were only kept from being enforced by the firm opposition of the people.

The Proprietors,—"true and absolute Lords," as they were pompously styled,—had witnessed the workings of democratic government in England, and they made no secret of their intention to prevent any such establishment in Carolina, declaring explicitly that the Constitutions were adopted "that we may avoid erecting a numerous democracy." Of course, they reserved for themselves the chief offices of the government, adopting the high-sounding titles of Palatine, Chamberlain, High Steward, Chancellor, etc. The divisions they made within the Counties recall the institutions of the Middle Ages. We find Signories and Baronies, the former being the share of the Proprietors and the latter of the provincial nobility, the Landgraves and Casiques, whose patents were issued by special authority derived from the king. "There shall be just as many Landgraves as there are Counties, and twice as many Casiques, and no more," ran one article of the Constitutions. "These shall be the hereditary nobility of the Province, and by right of their dignity be members of Parliament. Each Landgrave shall have four Baronies, and each Casique two Baronies, hereditarily and unalterably annexed to, and settled upon the said dignity." These were the only orders of nobility ever created on American soil, and they were jealously guarded by rigid laws of succession. It was provided that "whoever by right of inheritance shall come to be Landgrave or Casique, shall take the name and arms of his predecessor in that dignity, to be from thenceforth the name and arms of his family, and their posterity."

In addition to the Signory and Barony appeared the Manor, which is, however, by no means clearly defined. There was a "Lord of the Manor" as in England, but there is no reason to believe that it was intended to organize this institution on the exact model of the manor in the mother country. It seems to have been simply a name applied to certain estates consisting of not less than three thousand, and not more than twelve thousand acres, the owner of which was given special privileges and franchises by the

Proprietors. It would have been wholly impossible to have organized manorial courts as they existed in England, owing to the manner in which the country was settled, and very much the same thing can be said of the Baronies and Signories. They were simply names applied to institutions of a feudal nature which it was proposed to found, and an attempt was to be made in the course of time to conform them as nearly as possible to like institutions in England.

The Proprietors had just witnessed a period during which the historic names of the kingdom had, by the republican authority, been reduced to a mere shadow of their former greatness, and they were determined to raise up in America hereditary houses whose interest it would be at all times to maintain the feudal institutions by which they were surrounded. The rights and privileges of the nobility were not to be shadowy. They were to be as substantial as those of any twelfth century baron of England. Each Landgrave and Casique was by virtue of his dignity to be a member of the colonial Parliament with even greater privileges than were accorded to representatives chosen directly by the people. It was also declared that "in every Signory, Barony and Manor, the respective Lord shall have power in his own name to hold court leet there, for trying of all cases both civil and criminal." On the payment of the almost prohibitive sum of forty shillings the freeman could appeal from the Signory or Barony court to the County court, or from the manorial court to that of the Precinct. These courts leet are not described, but were doubtless to be organized on English models, though they must have combined several English jurisdictions, and could scarcely have followed the same mode of procedure as had been practised in the mother country.[1]

As we have seen, the freeman, under hard conditions, could appeal from the court leet, but it was in every case a final tribunal for the villain. Unlike his fellow-bondman in

[1] See Vinogradoff, Villainage in England, p. 362. (Clarendon Press edition.)

England,[1] under no circumstances could he appeal from the decision of his lord. In this instance, as in all others, the law regarding the villain was rigid and explicit. The lord was absolute master, and against him the villain had no rights. The leet man[2] was furthermore considered as belonging to the soil, nor could "any leet man or leet woman have liberty to go off from the land of their particular Lord, and live anywhere else, without license obtained from their said Lord." The absence of anything corresponding to chartered towns, or crown manors, precluded the possibility of escaping from bondage by the old rule of a residence of a year and a day within such privileged precincts. There was no "free air" in Carolina so far as the villain was concerned. Once a villain, always a villain, was a rule which was never to be violated, and it was expressly declared that "all the children of leet men shall be leet men, and so to all generations."

Had the system sought to be established by the Fundamental Constitutions been actively enforced, no doubt court decisions would, from time to time, have defined and modified the position of the leet man, as was the case in England, but certainly under the original law such a thing as the manumission or enfranchisement of a villain was out of the question. Nowhere was the lord given the right to alienate the villain from the soil, and everywhere is the implication found that his sovereignty did not extend so far. Article XV of the Constitutions provided that "since the dignity of Proprietor, Landgrave, or Casique cannot be divided, and the Signories and Baronies thereunto annexed must forever all *intirely* descend with and accompany that dignity," there should be no co-heirs, that is, no division or double proprietorship of the dignity, or of the estates ap-

[1] Vinogradoff, p. 65.

[2] The expression "leet man" in these Constitutions does not bear the same meaning as in England, but implies a pure villain. The Carolina leet man was distinctly unfree, and the use of the term in this paper will always imply that condition.

pertaining to it. This rule was so far flexible that the lord could lease out two thirds of the estate,— which included the villains,— for a term not exceeding twenty-one years, though the remaining third was always to be held as demesne. Thus while two thirds of the Signory or Barony could be alienated for a time, at the end of twenty-one years it reverted to the holder of the dignity, and the estate, including land, leet men, and all other appurtenances, became once more entire, and in the hands of the lord.[1]

Article XIX gave the Lord of the Manor much more liberty in regard to his estates, but at the same time indicated clearly that he had no right to dispose of the leet men separately from the land. He could "alienate, sell, or dispose to any other person, and his heirs forever, his Manor *all intirely together, with all the privileges and leet men thereunto belonging*, but this alienation had to be of the land, leet men, etc., in their entirety. No exceptions were allowed, and it was provided that "no grant of any part thereof, either in fee, or for any longer term than three lives, or one and twenty years, shall be good against the next heir." This makes it perfectly clear that the leet man could not be permanently alienated from the soil, although he could be leased, or hired out, very much as was done with slaves in later times. This was in keeping with the usage in early England where a man could no more give away a slave belonging to the family estate than he could a portion of the manor itself. According to the early English law before emancipating a slave the lord had to purchase him, to all intents and purposes, from the estate.[2] In later times actual sales of villains are recorded,[3] but the cases were rare, and in Carolina nothing of the kind could have been known. The leet man, under the Constitutions, was not in a state of personal servitude to the lord, and the

[1] By a temporary provision a Landgrave or Casique could at any time before 1701, dispose of his dignity and estates, if conveyed as a whole.

[2] Vinogradoff, *Note* on p. 87.

[3] Ibid., p. 157.

recognition of negro *slaves*, over whom the owner was granted "absolute power and authority," indicates that negroes, and no others, were to be considered as chattel property. There is scarcely any doubt that the leet man was intended to be held as a villain regardant to the Signory, Barony, or Manor, while the negro corresponded to the position of the villain in gross.[1] The only difference between the old English usage, and that intended for Carolina was in the case of the manorial estate. There the lord could dispose absolutely of the property and dignity provided it were conveyed as a whole. The purchaser then became Lord of the Manor, and could in turn dispose of the estate on the same conditions, the leet man in every instance remaining attached to the soil. The Manor, no more than the Signory or Barony, could be divided among coheirs, although one person was permitted to hold several Manors, and in such a case should there be no heirs male, the eldest daughter was to have her choice of the estates, the second daughter next, and so on "until all the Manors be taken up." In no case was a Manor to be divided, and during the life of the lord each one, with all its appurtenances, was to be kept separate and distinct from the others. The privileges pertaining to each were indivisible, and they had to be kept entire in order to maintain them. The idea was to perpetuate powerful families which were to be attached to the Proprietors by their interests just as the great houses of later feudal England were attached to the King. The Proprietors were, in short, to assume much the same position as was held by the Crown in England. All dignities and honors of whatever kind were held from them, and in the absence of heirs, all titles and estates reverted to their possession. In order to make their overlordship complete, no person was permitted to claim any land whatever by right of purchase from the native inhabitants, or others, but only "from and under the Lords Proprietors under pain

[1] See Vinogradoff, p. 48, for a discussion of this much disputed distinction.

of forfeiture of all his estate, moveable and immoveable, and perpetual banishment."

There were two methods of becoming a leet man. First, by being born to that estate, and second, by voluntarily entering one's self as such in the registry of the County court. There seems to have been no such thing contemplated as villainage by prescription.

The exact theory of the condition of the leet man is very difficult of formulation. It would seem most natural that the condition of the English villain at the latest period would generally have obtained with the villain in Carolina, but the fact that so many returns to the earlier custom are indicated,[1] would involve such a proposition in much doubt. It seems quite safe, however, to say that they were intended by the Constitutions to occupy that state described by Bracton as "pure villainage." They were to be worked at the will of the lord, performing absolutely uncertain services, and "knew not in the evening what was to be done in the morning."[2] But the leet man in Carolina was to be relieved of many hardships endured by the villain in England. One of the iniquities of the old feudal system was the collection of *merchetum*, a fine due the lord whenever a villain married off a daughter. Nothing of the kind was to be found in Carolina, but on the contrary the lord was required to give ten acres of land to every leet man or leet woman who might marry, they to pay him not more than one-eighth of the annual product. Care was taken, however, that no family of villains should accumulate property. This grant was only for the life of the beneficiary, after which the land reverted to the lord.

The Constitutions are silent on the subject of children one of whose parents only was a villain. The late practice in England was for a child born in wedlock to follow the condition of the father, while an illegitimate was considered

[1] The court leet itself will be noted as being a return to the earliest organization in England. See Digby, Hist. of the Law of Real Prop., p. 54.

[2] Taswell-Langmead, Eng. Const. Hist., p. 70.

filius nullius, and presumed free.[1] The fact that a leet woman as well as a leet man was to receive the gift of land at marriage, indicates the possibility of a return to the Roman law of the child following the condition of the mother, which had been rejected by the English courts almost from the beginning of feudalism.[2] It is very certain that a lord would not have been required to give land to a woman on her marriage in cases where the fruits of the union would have brought no increase to his estates. The gift was made in order that villains might be encouraged to marry and thus increase the value of the land to which they and their children were inalienably attached, and it would have been clearly against the interest of the lord to encourage marriages which would have tended directly to deplete the resources of his property. It is very probable, in view of these difficulties, that the grant of land was allowed only in cases where the contracting parties belonged to the same estate. The reversion of the marriage gift to the lord shows an intention to pursue a different policy from that which prevailed in England where, under certain circumstances, a villain could hold and devise lands and chattels.[3]

While the existing state of society in the world generally would have forced upon the Carolina villain many rights and privileges which were never heard of in feudal England, under these Constitutions in their liberal acceptation, his lot would have been immeasurably harder than that of the English villain. We have seen how the lord was absolute in his courts. Should a leet man appeal for relief from any extraordinary hardship, the lord judged the merits of the case, or had the power to dismiss it without a hearing, to drive the plaintiff back to his bondage, and even to punish him for his temerity, and there was no redress. In England, in comparatively early times, the villain had redress against the lord even in civil cases, and could go so far as to "implead his master in consequence of an agree-

[1] Vinogradoff, pp. 59-60. [2] Ibid., p. 59. [3] Ibid., p. 68.

ment with him."[1] In short, in England the courts of the realm were open for the relief of even the most degraded serf, and in the majority of instances would right his wrongs, or alleviate his hardships. In Carolina the leet man was at the mercy of the lord, and had to bear his hard fate, uncomplaining. It is scarcely to be supposed, however, that the power of the lord was intended to extend to the life and limb of the villain, although such would practically have been the case unless the Constitutions had been freely amended. It was provided that juries must consist of twelve men, and also that no nobleman could be tried save by a jury of his peers. But as there were never at any one time so many as twelve Landgraves or Casiques in the province, any crime committed by them against a leet man, or against anyone else for that matter, must have gone unpunished. When Landgrave Colleton was arraigned in 1690 for his alleged official misdemeanors, he could not be tried before a judicial tribunal, presumably because no legal jury could be secured, and his banishment was effected only by the passage of a bill of attainder through both houses of the provincial Assembly.[2] This course could be easily adopted where the public safety was deemed to be imperilled, but the authority of the Assembly could never have been thus invoked in behalf of an unknown villain, no matter what wrongs or outrages he might have suffered.

To the student of the present day, the whole spirit of the Fundamental Constitutions seems ludicrous in the extreme, and it is difficult to understand how so wise a man as John Locke could have lent himself to the work of devising so utopian a code. Although we hear of certain disputes between him and his patron, the Earl of Shaftesbury, concerning clauses of the Constitutions, which seems to indicate that Locke had some will of his own in their preparation, still we cannot but believe them to have been chiefly the work of Shaftesbury. It is impossible to think that he

[1] Vinogradoff, p. 70. [2] 2 S. C. Statutes, pp. 45-46.

who inveighed so strongly against arbitrary government of any kind, and who maintained with so much passionate logic the freedom of all men from subjection "to the inconstant, uncertain, unknown, arbitrary, will of another man,"[1] could have consigned by a stroke of his pen, as it were, hundreds and perhaps thousands, to hereditary bondage. But whatever may have been the real sentiments of the author, the Constitutions, as might have been anticipated, were doomed to utter failure. They proved to be the death-gasp of feudalism, and the little life the Proprietors had sought to breathe into the dead system, was quickly trampled out by the turbulent elements in the young government. The people maintained with obstinate pertinacity their opposition to the code, until at length the Proprietors were forced to permit the colony to be governed by modern methods.

While the subject of villainage is naturally the most interesting suggested by the Constitutions, there were many other provisions equally chimerical. The proposed judicial system would have been a wonder even in the Dark Ages. There were no less than eight supreme courts, in addition to the County and Precinct courts, and those of the Signory, Barony, and Manor. All these were organized only from the landlord class, even the petit juryman being required to hold fifty acres of land, in his own right, before he could sit in judgment on any cause. The court which smacked more than any other of a mediæval flavor was that of the Chamberlain, which consisted of a Proprietor and eight Counsellors, who were known as Vice-Chamberlains. It was declared that this body "shall have the care of all ceremonies, precedency, heraldry, reception of public messengers, pedigrees, the registration of all births, burials, and marriages, legitimation, and all causes concerning matrimony, or arising from it; and shall also have power to regulate all fashions, habits, badges, games, and sports." The idea of a court of heraldry in the savage forests of the new

[1] Locke, Second Treatise on Government, c. iv.

world was one that could suggest itself only to a mind devoid of the remotest sense of humor. It is needless to add that this remarkable tribunal was never convened.

The Constitutions were not wholly without noble touches, however. There was something of an old chivalric ring, of a fine scorn to take advantage of a fellow-man in distress, in the declaration that "it shall be a base and vile thing to plead for money or reward," and no one but a near kinsman was allowed to advocate another's cause in court until he had taken an oath "that he doth not plead for money or reward, nor hath, nor will receive; nor directly, nor indirectly, bargained with the party whose cause he is going to plead, for money or any other reward."

Carolina had not been long founded when the proprietors saw that their subjects could not be induced to conform to the stringent and antiquated requirements of this "sacred and unalterable form and rule of government," and during their rule the Constitutions were frequently revised, though they were never put in force by the people. They were practically abrogated less than a quarter of a century after the landing of the first colonists, although it was not until the Revolution of 1719 when the proprietary government was overthrown, and the colony attached to the Crown, that they ceased to exist in theory. That year is memorable as marking the final and absolute extinction of feudalism in the English world.

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